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No. 96-___

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In The

Supreme Court of the United States

October Term, 1996

ROBERT C. SHINN, JR., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection,

Petitioner,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC.; C & A CARBONE, INC.; NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION, NEW JERSEY CHAPTER; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is New Jersey's solid waste management system, which regulates solid waste disposal as a public utility and grants to governmental subdivisions exclusive franchises, exempt from Commerce Clause scrutiny under the "market participant" exception?

2. May New Jersey constitutionally control and manage solid waste disposal as a traditional public utility through grants to governmental entities of monopoly authority tempered with rate regulation even though monopolization of the local market incidentally impacts on interstate commerce interests that would otherwise be allowed direct access to generators of waste?

3. In light of the continuing uncertainty as to the viability of equitable remedies for constitutional violations, *Ryder v. United States*, 115 S.Ct. 2031 (1995), did the United States Court of Appeals for the Third Circuit err in finding that there was no federal judicial discretion remaining under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for affording the New Jersey Legislature the opportunity to fashion the appropriate remediation of its statewide regulatory scheme in the face of grave environmental and fiscal disruption and legitimate reliance on a prior judicial determination specifically upholding the New Jersey system against the very Commerce Clause challenge at issue herein, *J. Filiberto Sanitation v. DEP*, 857 F.2d 913 (3d Cir. 1988)?

LIST OF PARTIES

In the proceedings below, Atlantic Coast Demolition & Recycling, Inc. was the plaintiff in the first-filed action (Civil Action No. 93-2669 (JEI)) and named as parties-defendants the Board of Chosen Freeholders of Atlantic County, the Atlantic County Utilities Authority, the Board of Chosen Freeholders of Camden County, the Pollution Control Financing Authority of Camden County and Scott A. Weiner, in his capacity as then-Commissioner of the Department of Environmental Protection and Energy ("State" or "Department").[1] All defendants except the Department agreed not to participate in the proceedings and agreed to be bound by the determination in consideration of which the plaintiff would not seek counsel fees against them pursuant to 42 U.S.C. § 1988. In the district court, the Mercer County Improvement Authority and the Gloucester County Improvement Authority were granted leave to appear as *amici curiae*.

On leave of the Court of Appeals for the Third Circuit, the following county authorities appeared as *amici curiae*: Hudson County Improvement Authority, Passaic County Utilities Authority, Essex County Utilities Authority, Mercer County Improvement Authority and Cape May County Municipal Utilities Authority. The Pennsylvania Department of Environmental Resources also was granted *amicus curiae* status.

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[1] During the course of these proceedings, the Department of Environmental Protection and Energy was reorganized and denominated the Department of Environmental Protection.

LIST OF PARTIES – Continued

Upon remand from the Court of Appeals, the *Atlantic Coast* proceeding was consolidated with Civil Action No. 94-3244 (JEI) filed by plaintiffs below C & A Carbone, Inc., Mayor Brett Schundler of the City of Jersey City, Mayor John Rooney of the Borough of Northvale, Mayor Dwight DeStefan of the Township of River Vale, the City of Passaic, the City of Paterson, the New Jersey Chapter of the National Solid Waste Management Association, and the Waste Management Association of New Jersey (hereinafter referred to as *Carbone II*). The named defendants in *Carbone II* were Robert C. Shinn, Jr., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection and Energy, the New Jersey Department of Environmental Protection and Energy, Larry J. McClure, individually and in his capacity as Executive Director of the Bergen County Utilities Authority, the Bergen County Utilities Authority, Mark Guarino, individually and in his capacity as Director of the Bergen County Health Department, the Bergen County Health Department, Kenneth Blane, individually and in his capacity as Executive Director of the Hudson County Improvement Authority, the Hudson County Improvement Authority, Carol Ann Wilson, individually and in her capacity as Director of the Hudson County Health Department, William P. Schuber, individually and in his capacity as County Executive for Bergen County, Robert C. Janiszewski, individually and in his capacity as County Executive for Hudson County, Passaic County Utilities Authority, Anthony Ross, individually and in his

LIST OF PARTIES – Continued

capacity as Executive Director of the Passaic County Utilities Authority, and Nicola R. DiDonna, individually and in his capacity as County Executive of the County of Passaic.

On leave of the district court, the Hudson County Improvement Authority, the Passaic County Utilities Authority, the Essex County Utilities Authority, the Mercer County Improvement Authority, the Cape May County Municipal Utilities Authority, and the Camden County Energy Recovery Associates, L.P., were allowed to intervene as defendants in the consolidated cases. By order entered on June 9, 1995, the various municipal plaintiffs in *Carbone II* were dismissed from the case.

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PETITION FOR A WRIT OF *CERTIORARI*

The petitioners respectfully pray that a writ of *certiorari* issue to review the judgments and opinions of the United States Court of Appeals for the Third Circuit entered on February 16, 1995 (concerning which a petition for rehearing was denied March 28, 1995) and, after remand to the United States District Court for the District of New Jersey, on May 1, 1997 (concerning which a petition for rehearing was denied June 5, 1997).

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Third Circuit and the order Sur Petition for Rehearing En Banc are reported at 48 F.3d 701 (3d Cir. 1995) and are appended to this petition as Appendix A. That opinion, which remanded the matter for further proceedings, reviewed the unreported opinion of the District Court dated September 8, 1993, appended to this petition as Appendix B, and its order denying preliminary injunctive relief dated September 10, 1993, appended to this petition as Appendix C, which was entered as the final judgment in the District Court by its order dated February 28, 1994, appended to this petition as Appendix D. The final opinion and judgment of the United States Court of Appeals for the Third Circuit is reported at 112 F.3d 652 (3d Cir. 1997) and is appended to this petition as Appendix E. The order Sur Petition for Rehearing En Banc dated June 5, 1997, is appended to this petition as Appendix F. The preliminary and final orders entered by the District Court on remand are reported at 893 F.Supp. 301 (D.N.J. 1995); 909 F.Supp. 229 (D.N.J. 1995); and 931 F.Supp. 341 (D.N.J. 1996) and are appended to the petition as Appendix G, H and I respectively.

JURISDICTION

The final opinion and judgment of the United States Court of Appeals for the Third Circuit was entered on May 1, 1997. The Court of Appeals for the Third Circuit denied a timely petition for rehearing, with suggestion for rehearing *in banc*, by an order dated June 5, 1997. This petition is, therefore, timely. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Original jurisdiction was invoked under 28 U.S.C. § 1331.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The state law provisions challenged in this matter are the solid waste flow regulations found at N.J.A.C. 7:26-6.5 *et seq.*, set forth as an appendix to the opinion of the Court of Appeals, 112 F.3d at 673-82, appended to this petition as Appendix A, which were promulgated pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* ("SWMA"), and the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 *et seq.* ("SWUCA"). The constitutional provision at issue is the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

As this Court recognized in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), New Jersey is the most densely populated state in the Nation and as such has always been at the forefront of the environmental problems associated with society's generation of waste materials. The need to assume more deliberate management of solid waste in New Jersey specifically arose out of a crisis in the 1970's and 1980's of scarce acceptable disposal sites and the spread of illegal dumping, exacerbated by increased generation of solid waste. (Pet. App. 46). In addition, the Legislature's actions were prompted by New Jersey's long history of organized crime influence

over the solid waste industry. *Trade Waste Management Ass'n v. Hughey*, 780 F.2d 221 (3d Cir. 1985). In the 1970's, the "competitive" market for solid waste services in New Jersey operated through an underground system of "property rights" and illusory competition. *State v. Scioscia*, 200 N.J.Super. 28, 32-33, 490 A.2d 327 (App. Div. 1985).

New Jersey has also always been at the forefront of designing the solutions to these systemic concerns. After this Court overturned New Jersey's importation restriction provision in *Philadelphia*, New Jersey embarked on a bold plan to regulate the entire solid waste disposal and collection industry as public utilities in order to assure its citizens safe, adequate and effective service, taking into account the influx of interstate waste and the lack of dependability of the commercial sector. New Jersey established a system where *public* ownership of the utility plant or equipment dedicated to public use for solid waste disposal predominated. N.J.S.A. 13:1E-19, -27. Exclusive franchises were granted to local county authorities that then raised significant capital for the needed infrastructure through issuance of tax-exempt municipal revenue bonds premised on their utility market shares of the waste generated. N.J.S.A. 48:13A-5, -6.3. Thus, the disposal marketplace in New Jersey became a full-fledged utility market in which government participated as the major player with qualified interstate companies providing vendor and supply services under typical public contract requirements.[2]

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[2] Pursuant to state law, the governmental entities that operate the public solid waste facilities in New Jersey must use an open and competitive bid process. Local Authorities Fiscal Control Law, N.J.S.A. 40A:5A-11 *et seq.*, Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.*, and the "McEnroe" Amendments to the SWMA, N.J.S.A. 13:1E-136 *et seq.*

Regulation of the solid waste disposal industry as public utilities places far greater obligations upon participants than mere compliance with environmental permits. This legislative designation was deemed necessary in order to "meet the requirements of an increasingly complex and interdependent society." *In re Application of Saddle River*, 71 N.J. 14, 22, 362 A.2d 543 (1976). A solid waste public utility, like traditional utilities, provides an essential service to the public at just and reasonable rates, N.J.S.A. 48:13A-2, and in a nondiscriminatory manner. N.J.S.A. 48:3-3, -4. The solid waste utility also has a duty to provide service to all customers, regardless of any single customer's profitability. *In re Twp. of Lakewood*, 29 N.J.Super. 422, 102 A.2d 671 (App. Div. 1954); N.J.S.A. 48:2-23. The public utility may not abandon or discontinue service without authorization. N.J.S.A. 48:2-24. In addition, it may not adjust its rates without approval from the Department. N.J.S.A. 48:2-21.

The solid waste utility management scheme specifically requires the twenty-one counties and the Hackensack Meadowlands District to operate as solid waste management districts and to plan for the collection, transportation and disposal of all solid waste generated in the district. N.J.S.A. 13:1E-19, -21. Each district plan must then be reviewed and certified by the Department to ensure its consistency with statewide solid waste management objectives, criteria and standards. N.J.S.A. 13:1E-24. By the early 1980's, the Department had approved solid waste management plans for each of the 22 solid waste districts.[3] *Draft Statewide Solid Waste Management Plan Update 1993-2002*, Executive Summary.

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[3] The specific plans vary from county to county based on the composition and amount of the waste stream, existing disposal capacity and anticipated needs. The plans of several counties are described in more detail in the record below.

(App.(1995) A-508).[4] However, the long simmering solid waste disposal crisis had continued to intensify. As described in the *Draft Plan Update*, while New Jersey was developing its solid waste utility management system, a number of states moved to restrict the availability of their scarce disposal capacity. On several occasions, waste from New Jersey was banned without notice which caused serious disruptions and unhealthy conditions as waste collected on the streets. (App.(1995) A-509).

From these lessons and that of *Philadelphia*, New Jersey took upon itself even more rigorous ambitions in the field of waste management. As part of its particular attack on the national solid waste problem, New Jersey has established what are probably the most stringent recycling goals in the country, with 50% of the municipal waste stream and 60% of the total waste stream required to be recycled by December 31, 1995. For the remaining, nonrecyclable waste stream, New Jersey sought to obtain in-state disposal self-sufficiency at its publicly owned facilities. (App.(1995) A-510). These goals form the core of New Jersey's solid waste management system and constitute the solid waste management objectives with which district plans must now be consistent. N.J.S.A. 13:1E-24. Furthermore, this New Jersey scheme had been upheld under the dormant Commerce Clause by the Court of Appeals in 1988. *J. Filiberto Sanitation, Inc. v. DEP*, 857 F.2d 913 (3d Cir. 1988).

In all of the districts, solid waste is managed either directly by the county government or by implementing public agencies created and designated by the county. Such entities may be municipal utilities authorities, N.J.S.A. 40:14B-1 *et seq.*, county improvement authorities,

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[4] "App.(1995) A-___" refers to the Joint Appendix filed in the first appeal to the Court of Appeals for the Third Circuit. 48 F.3d 701. "App.(1997) A-___" refers to the Joint Appendix filed in the second appeal. 112 F.3d 652.

N.J.S.A. 40:37A-1 *et seq.*, or pollution control financing authorities, N.J.S.A. 40:37C-1 *et seq.* (Pet. App. 257-58). The authorities are created by the governing bodies of the counties to exercise the essential governmental function to "foster and promote by all reasonable means . . . the collection, disposal and recycling of solid waste . . . in an environmentally sound manner." N.J.S.A. 40:14B-2. These authorities are granted the power, *inter alia*, to provide for and secure the payment of bonds to raise funds to pay the cost of any portion of its system that is necessary or useful and convenient for solid waste programs. N.J.S.A. 40:14B-3, 48:13A-6.3.

To finance capital improvements, the authorities pledge their service charges toward the repayment of such bonds. N.J.S.A. 40:14B-30. A guaranteed stream of waste over the life of the facility has a substantial beneficial impact on the cost of debt for this type of project financing. (App.(1995) A-594). Presently, there are approximately $1.75 billion in outstanding tax-exempt revenue bonds that had been issued by these authorities between the judicial affirmance in *Filiberto* and the Court's review of solid waste flow regulations in *C & A Carbone, Inc. v. Town of Clarkstown ("Carbone I")*, 511 U.S. 383 (1994). (App.(1997) A-593). These securities were sold under express revenue, debt repayment and operational covenants. (App.(1997) A-921).

As the public entity responsible to provide for this public utility function, most districts or their implementing authorities have applied for and received the award of an exclusive franchise upon the determination that the public interest so required and that the franchise conformed to the district solid waste plan. N.J.S.A. 48:13A-5(a). The franchises grant the "exclusive right to control and provide for the disposal of solid waste, except for recyclable material whenever markets for those

materials are available." N.J.S.A. 48:13A-5(c).[5] The waste flow regulations provide the public notice as to which public utility authority is specifically responsible for the waste generated in each municipality in New Jersey. N.J.A.C. 7:26-6.5 *et seq.*[6] The rules are consistent therefore with the obligation of each solid waste management district to provide for the disposal of all waste generated. N.J.S.A. 13:1E-21. They are grounded in the Legislature's goal of ending the piecemeal, uncoordinated approach to solid waste management and planning that predated these statewide policies initiated over 20 years ago. Through this model of public utility regulation of the solid waste industry, New Jersey has made it clear that the provision of environmentally sound and reliable solid waste service is as critical to every citizen as the provision of electricity and water.

The initial complaint in this matter was filed on June 23, 1993, by a Philadelphia solid waste material recovery facility, Atlantic Coast Demolition & Recycling, Inc., and sought a declaration that the waste flow regulations are violative of the Commerce Clause of the United States Constitution. It also sought preliminary and permanent

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[5] New Jersey regulations provide that those recyclable materials are not directed pursuant to waste flow once separated from the solid waste stream. N.J.A.C. 7:26-1.1(a)(1). The marketing of recyclables and the separation of recyclables from the waste stream for marketing can be performed competitively by licensed private entities. See N.J.A.C. 7:26A-1 *et seq.*; N.J.A.C. 7:26-1.4.

[6] The designations set forth in the regulations were adopted through the county planning process and may be modified by subsequent adoption by the Department. N.J.A.C. 7:26-6.6. Where an emergency condition exists, the Department may redirect waste flow prior to the adoption of a plan amendment by the county. N.J.A.C. 7:26-6.7.

injunctive relief restraining the Department from enforcing those regulations. On September 8, 1993, the district court concluded, under the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and the controlling precedent of *Filiberto*, that the state interests served by the waste flow regulations outweighed any incidental burden on interstate commerce. With the consent of the parties, these findings and conclusions became the final judgment of the court on February 28, 1994. (Pet. App. 100).

Upon filing of the appeal, the matter was stayed pending this Court's anticipated decision in *Carbone I*. Thereafter, on February 16, 1995, the Court of Appeals for the Third Circuit issued its order which overruled the *Filiberto* precedent as to the appropriate standard to be applied under the dormant Commerce Clause, reversed the lower court's ruling and mandated application of the *Carbone I* strict scrutiny standard. The Court of Appeals rejected the State's argument that the governmental and public utility character of its statewide solid waste management system required application of either the market participant exception to the Commerce Clause, *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), or the *Pike* balancing test, *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm.*, 341 U.S. 329 (1951). The Court of Appeals considered *Panhandle*'s Commerce Clause analysis as undermined by more recent case law and held that public utility regulations might now be subject to heightened scrutiny.(Pet. App. 32). The Court of Appeals remanded the matter to the district court to determine the "feasibility and effectiveness of alternative measures [that] pose technologically and economically complex issues" for New Jersey and to assess what, if any, appropriate relief should be entered. (Pet. App. 41).

On remand, the trial court consolidated the *Atlantic Coast* matter with another challenge to the New Jersey solid waste flow system filed and stayed during the appellate process. *C & A Carbone, Inc., et al. v. Shinn, et al.*,

Civil Action No. 94-3244 (*"Carbone II"*). The plaintiffs in both matters filed motions for preliminary injunctive relief which were granted in part and denied in part. On June 9, 1995, the court issued a conditional preliminary injunction only with respect to construction and demolition waste ("C&D"), which accounts for approximately 12% of the waste stream, and provided the State with additional time to submit a plan for the alternative management of C&D. (Pet. App. 178). After further proceedings on the alternative plan, the district court granted the motion for *pendente lite* relief as to C&D waste on November 28, 1995, and gave the State sixty days to implement the plan. (Pet. App. 215). Emergency regulations implementing the State's plan went into effect on January 29, 1996. 28 N.J.R. 1305 (2/20/96).

On July 15, 1996, after submission of extensive written testimony on the application of the strict scrutiny standard, the trial court entered its final order ruling for the first time that the New Jersey system was unconstitutional under the Commerce Clause because it found that generally there were alternatives available.[7] With respect to the appropriate relief to be entered, the court made permanent the C&D injunction and permanently enjoined the waste flow regulations with respect to the remaining waste types but stayed that injunction for two years after the exhaustion of appeals in order to allow the State the opportunity to design and implement a new management scheme. The court specifically found that "[a]n outright ban of the current flow control regulations without immediate implementation of a new, comprehensive waste management system would have disastrous effects on

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[7] While holding the State to the strict scrutiny standard that requires invalidation if feasible alternatives exist, the court declined to address the legal viability of those alternatives, even though these plaintiffs have assailed their constitutionality in this record and in other forums. (Pet. App. 283-84).

New Jersey" (Pet. App. 264), and that to enjoin immediately the "detailed regulatory plan implemented over decades and relied upon by investors, business people, and political figures would wreak havoc on the financial and environmental well-being of New Jersey citizens." (Pet. App. 286).

Upon cross-appeals from this final order, the Court of Appeals affirmed the finding of unconstitutionality but reversed the trial court's entry of an equitable stay.[8] In spite of the lower court's findings that "the relevant governmental bodies [must be permitted] to develop the specific nondiscriminatory alternative which they wish to employ, and this development cannot be done overnight" (Pet. App. 286-87), the Court of Appeals focused solely on the cost of remediation and not on the policy and timing considerations. It assumed on behalf of the State that few changes were needed "except that the twenty-two waste management districts must modify their waste disposal plans and choose new facilities to service their needs in a non-discriminatory fashion." (Pet. App. 145). The Court of Appeals thereby required the State to immediately remediate its comprehensive 20-year old system upon completion of any further appeals.

The Court of Appeals justified the denial of any remedial opportunity by equating the complex environmental and fiscal issues involved in designing a new system with the mere financial cost of a constitutional remedy that cannot justify perpetuation of an unconstitutional law. (Pet. App. 146). The Court of Appeals rejected the State's argument that principles of federalism and equity, *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Lemon v. Kurtzman*, 411 U.S. 192 (1973), require deference to the

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[8] The Court of Appeals entered a stay-pending-appeal of its injunction; neither the plaintiffs nor the court questioned that authority. (Pet. App. 143).

state for the design of a constitutional solution in the first instance under circumstances such as present here of a grave disruption to an extensive, judicially-upheld public system, upon which investors and the public had relied in raising more than $1.75 billion in public revenue bonds. (Pet. App. 268-69) The Court of Appeals also held that this Court has overruled *Chevron* as an appropriate test for whether a new principle of law will be applied retroactively, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 751 (1995); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993), and further stated that –

> After *Hyde* and *Harper*, it is unclear as to what extent a court may, after 'applying' a new principle of law retroactively, separately consider equitable factors in shaping an appropriate remedy for a constitutional violation. . . . Moreover, if a court may still engage in a separate remedial inquiry, it is unclear what factors may be considered, and whether these include a defendant's reliance interests. [Pet. App. 150]

Upon the State's petition, the Court of Appeals denied rehearing of the issues decided and refused to address intervening new case law, *General Motors Corp. v. Tracy*, ___ U.S. ___, 117 S.Ct. 911 (1997), which reaffirmed the Court's prior recognition of the importance of state regulation of utility services. *Panhandle, supra.*

ARGUMENT

I. CONSISTENT WITH THIS COURT'S RULINGS IN *WYOMING* AND *REEVES* AND ITS RESERVATIONS IN *PHILADELPHIA* AND *FORT GRATIOT*, THE COURT OF APPEALS SHOULD HAVE FOUND THAT NEW JERSEY'S PUBLICLY OWNED SOLID WASTE DISPOSAL UTILITIES ARE EXEMPT FROM THE COMMERCE CLAUSE AS PARTICIPANTS IN THE SOLID WASTE PUBLIC UTILITY MARKETPLACE.

Under the dormant Commerce Clause, Art. I, § 8, the constitutional inquiry must be whether the challenged

state provision impedes the free private trade in the national marketplace. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949). The Court has reviewed state regulations under that Clause by examining whether they operate to favor local commercial interests or disfavor out-of-state ones. *Carbone I*, 511 U.S. at 392. The Court has just as plainly noted that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate in the free market." *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980). When the state takes on a proprietary role, such as building public projects, *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983), or subsidizing disposal services, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), it participates in the respective market and is not using its governmental authority to benefit or favor third-party commercial operators. Rather, such state programs have been described as an effective and creative means of solving local problems. *Reeves*, 447 U.S. at 441. While engaged in those economic experiments, the state is entitled to status as a "market participant" and is free of federal restraints, including the Commerce Clause, just as a comparable private proprietor would be. *Reeves*, 447 U.S. at 439. Thus, the doctrine protects states that are acting as parties to a commercial transaction. *Id.* at 437.

The New Jersey system does not constitute "just one more instance of local [commercial] processing requirements that . . . long have [been] held invalid." *Carbone I*, 511 U.S. at 391, because it involves no favoritism at all. New Jersey's regulations do not favor a single in-state service provider, *Carbone I*, or multiple in-state commercial interests, *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). New Jersey is simply purchasing solid waste processing services with its own dollars. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 911, *reh'g denied*, 116 S.Ct. 1453 (1996). Unlike the typical local processing provisions invalidated by the Court and

summarized in *Carbone I*, New Jersey has not required articles of commerce to first proceed through a local business. 511 U.S. at 392. Rather, New Jersey has removed solid waste disposal services from the commercial arena entirely by providing for those services itself. Thus, New Jersey does not "hoard[ ] solid waste, and the demand to get rid of it, *for the benefit of the preferred* processing facility . . . [owned by] a single local *proprietor*." *Ibid.* (emphasis added). Because New Jersey's waste flow regulations do not incorporate any commercial favoritism or preferences, they do not come within the scope of the dormant Commerce Clause.

Neither in the specific context of solid waste flow regulations, *Carbone I*, nor in challenges to other types of solid waste policies has the Supreme Court addressed the question whether *public* operation of a solid waste facility would fall within the ambit of the Commerce Clause. *Philadelphia*, 437 U.S. at 627 n.6 ("We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources, or New Jersey's power to spend state funds solely on behalf of state residents and businesses."). *Accord Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 107 n.9 (1994) (not the "occasion to decide whether Oregon could validly accomplish its limited cost-spreading through the 'market participant' doctrine . . . or other means unrelated to any regulation of interstate commerce."). The Court also specifically reserved this question in *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 358-59 (1992), stating "Nor does the case raise any questions concerning policies that municipalities or other government agencies may pursue in the management of publicly owned facilities." This pressing question of national importance to states and their local subdivisions is ripe for review herein.

In the within matter, the Court of Appeals recognized the unsettled nature of the question, (Pet. App. 36) but nevertheless rejected New Jersey's claim to market participant status because the waste flow regulations do not merely "determine the manner or conditions under which the government will provide a service, they require all participants in the market to purchase the government service. . . . " (Pet. App. 39) In its analysis, the Court of Appeals ignored the other critical aspect of New Jersey's solid waste experiment, namely that the government service providers were operating through grants of state-sanctioned monopoly utility franchises. *General Motors, supra.*

The threshold determination to be made in a claim of market participation is in which market is government participating. *South-Central Timber Dev. v. Wunnicke,* 467 U.S. 82 (1984). In the within case, the Court of Appeals should have asked the question: "What other business can *require* its customers to use its services?" The answer is evident in the utility structure of the New Jersey solid waste management scheme. One of the basic principles of public utility operations is that it has a "captive" or "core" customer base. The *quid pro quo* for that state-sanctioned monopoly is that the utility is rate regulated, has a duty to provide non-discriminatory service to all who require it, and cannot abandon service without prior approval. *General Motors,* ___ U.S. at ___, 117 S.Ct. at 821-23; *Panhandle, supra.* New Jersey's publicly-owned solid waste facilities operate in a utility market rather than a free market. Generators of waste are the utilities' core customer base required to use the designated facilities.

New Jersey has made the policy determination, as the direct result of its past experiences with the purely private industry, *cf. Carbone I,* 511 U.S. at 393, that it is necessary for public authorities to monopolize the procurement decisions with respect to solid waste disposal in

the marketplace in order to ensure the adequate provision of those services to all citizens. This health and safety policy established on behalf of the people of New Jersey by their elected representatives is entitled to a strong presumption of validity. *Brotherhood of Loco. Firemen & Eng'men v. Chicago, R.I.&P.R. Co.*, 393 U.S. 129, 138 (1968). While other states have not relied upon a utility model to deliver disposal services, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems." *Addington v. Texas*, 441 U.S. 418, 431 (1979).

In sharp contrast to Clarkstown, New Jersey gives the authority the exclusive right to enter the disposal marketplace on behalf of generators within the franchise area, to be parties to the commercial transactions and to spend the collective dollars of the system users. N.J.S.A. 48:13A-5. In addition to the annual disbursements made for disposal services, the governmental entities have invested over $1.75 billion of publicly financed debt in long-term capital improvements and infrastructure. *See Reeves, supra. See also GSW, Inc. v. Long County, Georgia*, 999 F.2d 1508 (11th Cir. 1993). Those monies are not spent to shower favoritism upon New Jersey local enterprise. Rather, they were invested by government utilities into the interstate solid waste processing market on the basis of highly regulated decisions. Even if those public dollars are required to be spent in-state, there is still no constitutional violation.

Contrary to the Court of Appeals' ruling, the State's goal of in-state self-sufficiency in solid waste disposal is immune from challenge because the State may obligate its government utilities to attempt to spend their public disposal dollars in New Jersey if possible. *Wyoming, supra*. In *Wyoming*, the Court struck down an Oklahoma statute on Commerce Clause grounds which required coal-fueled electric generating plants to burn a mixture of at least 10% Oklahoma-mined coal. However, the Court

drew a distinction between the three private electric utilities and the state authority that also generated coal-fired electricity. While the Court ultimately found that the unconstitutional aspect of the provision was not severable, the Court expressly held that the "GRDA is an agency of the State of Oklahoma, and, as such, Oklahoma acts as a market participant in directing its purchases of coal." *Id.* at 802-03. Therefore, if all the electricity used in Oklahoma was generated by the GRDA, then it could all be burdened with the "buy Oklahoma" mandate. In New Jersey, the public utility authorities are all burdened with the "buy New Jersey" disposal capacity goal of self-sufficiency.[9]

The active participation by government utilities authorities in the solid waste disposal market clearly distinguishes New Jersey's system from the local ordinance invalidated in *Carbone* and presents the case reserved by *Fort Gratiot*. It is thus clear that New Jersey's solid waste management districts that have invested substantial public monies into the solid waste infrastructure are entitled to application of the market participant doctrine that enables "the people [acting through their local government] to determine as conditions demand . . . what services and functions the public welfare requires." *Reeves*, 447 U.S. at 438 n.11.

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[9] Similarly, there is no basis for a constitutional complaint that the franchise grant itself was not open to interstate competition, 48 F.3d at 715, because government has the absolute political right to determine for its citizens to provide a government service with government dollars rather than to privatize the service and put it out to bid.

II. THE COURT OF APPEALS' DETERMINATION THAT THE NEW JERSEY SOLID WASTE MANAGEMENT SCHEME DISCRIMINATES AGAINST INTERSTATE COMMERCE IS INCONSISTENT WITH THIS COURT'S RULINGS IN *GENERAL MOTORS* AND *PANHANDLE*

Even if the Court does not accept that New Jersey is exempt from the bounds of the dormant Commerce Clause as a market participant, it is clear that the Court of Appeals erred in its analysis because it ignored this Court's pronouncements in the public utility field. *Panhandle, supra; General Motors, supra.* While the system may have an incidental effect on interstate commerce, it is a nondiscriminatory effect that pales in comparison to the substantial public benefits that have resulted. *See Filiberto, supra.*

As even the lower court recognized, inherent in any public utility regulatory scheme is the state-sanctioned monopoly and resulting captive customer base. (Pet. App. 29) While a monopolization of the customer base by definition means that the utility has a state-sanctioned edge over a competing provider of those same or similar commercial services, the Court has never held that a state utility regulatory scheme violates the dormant Commerce Clause because it requires the customer to utilize a particular local service provider.

In *Panhandle,* the Court determined that there were burdens imposed on interstate firms by the monopolization by the public utility of the retail service market but that those burdens were incidental, not discriminatory, and that they were not excessive in comparison to the important public benefits supported by universal utility service. *Panhandle,* 341 U.S. at 336. Although the Court of Appeals believed that later cases such as *Wyoming* represented the potential applicability of heightened scrutiny to utility regulation, (Pet. App. 32) *Wyoming* does not undermine the *Panhandle* principle.

The state action that was scrutinized in *Wyoming* was not the basic utility principle of an exclusive customer base. That principle is derived from the monopolization of the *demand* side of the utility service. The Court in *Wyoming* was examining the *supply* side of the equation and rejected Oklahoma's asserted right to regulate the otherwise free-flowing interstate character of a commercial enterprise's supply contracts.[10] Therefore, the *Wyoming* Court did not address the demand side of the utility equation, leaving *Panhandle* as the only such case under Commerce Clause jurisprudence. In *Panhandle*, the Court specifically noted, as it should herein, that interstate commerce is not shut out of the marketplace altogether by the franchised facility but the option of the plaintiff enterprises to engage in business is restricted to the wholesale market or to any other area deemed by the regulators to be consistent with the public convenience and necessity. 341 U.S. at 336.

In the Court's most recent review of the interstate commerce implications of utility regulation, *General Motors*, a case which the Court of Appeals chose to ignore altogether, the analysis was even more finely tuned. In *General Motors*, the Court took a step back from the substantive analysis of the impact of the burdens on commerce to ask the threshold question whether commercial interstate enterprises are similarly situated to a public utility holding a grant of monopoly authority for bundled retail service to end-users. ___ U.S. at ___, 117 S.Ct. at 814. The determination of whether there can even be discrimination depends on a commonality between the compared

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[10] The Court also addressed and specifically did not reject the ability of a state to regulate the character of the supply contracts of its own agencies or local subdivisions. As stated above, New Jersey has imposed a "Buy New Jersey" mandate on its local agencies through the self-sufficiency goal of its state solid waste management plan.

enterprises. *Id.* Any similarity is utterly lacking where commercial solid waste facilities opt to compete for only the "cream" of the customer base against government-owned utilities burdened with the universal obligation to provide a bundled service.[11] *See People of the State of New York v. McCall*, 245 U.S. 345, 351 (1917). Thus, New Jersey's scheme that creates governmental utility districts and requires their use does not discriminate against for-profit solid waste disposal facilities which desire to provide an unbundled service at admittedly cheaper and unregulated rates. New Jersey's system does not discriminate in purpose or by effect because there is "an absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market." *General Motors*, ___ U.S. at ___, 117 S.Ct. at 826.

The public interest is served by utility regulation for the promotion of those services which are indispensable to large segments of the population without excessive and discriminatory rates or inferior service. *See Southwest Gas Corp. v. Arizona Corp. Comm.*, 169 Ariz. 279, 818 P.2d 714, 721 (App. 1991); *Medigen of Kentucky, Inc. v. Public Serv. Comm.*, 985 F.2d 164, 167 (4th Cir. 1993). The New Jersey Legislature's determination to bring the solid waste industry within the utility framework and delegate responsibility for it to governmental authorities cannot be

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[11] The Court of Appeals erred in not recognizing that the solid waste districts offer a basic service bundled with rights and benefits both qualitatively and economically different from the unbundled services offered by the plaintiffs. The difference is not attributable to private profit or excessive cost. Rather, the difference is directly and entirely attributable to the utility's obligation to provide recycling, educational, enforcement and household hazardous waste programs, as well as to dispose of both profitable and nonprofitable waste products, such as putrescible municipal waste, chemically treated wood or old stoves.

characterized as purposeful discrimination against interstate commerce. "[T]he regulation of utilities is one of the most important functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm.*, 461 U.S. 375 (1983) (citing *Munn v. Illinois*, 94 U.S. 113 (1877)). Solid waste utilities in particular provide a service to what would otherwise be a public nuisance. *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905) (exclusive franchise granted operator of solid waste crematorium upheld).

In New Jersey, the public suffered through periods of wasteful competition followed by monopolistic pricing, bid rigging and anticompetitive activities in the solid waste industry, much as the Court reflected occurred in the natural gas and electric industries. *General Motors*, ___ U.S. at ___, 117 S.Ct. at 820. The New Jersey solid waste management system is constitutional because New Jersey has determined that the public interest requires a state-regulated captive solid waste disposal market. While the state or national government could mandate the unbundling of those services, as Congress has done in the natural gas arena, the dormant Commerce Clause cannot be used as a sword to force a state to make that legislative determination.

In sum, the analysis of the court below, that New Jersey's solid waste utility system discriminates against out-of-state disposal facilities and thus is subject to the strict scrutiny standard, is flawed because the ban of direct retail sales has only an incidental effect on commerce, has been determined to be in New Jersey's public interest, and actually raises a comparison of non-similarly situated entities: bundled utility "apples" versus unbundled profit-based "oranges." Thus, the New Jersey system, as properly judged under the *Pike* test, should have been held to be constitutional.

III. THE RULING OF THE COURT OF APPEALS WAS NOT CONSISTENT WITH WELL-FOUNDED PRINCIPLES OF FEDERALISM AND EQUITY THAT REQUIRE THE JUDICIAL BRANCH TO AFFORD THE STATE LEGISLATURE AND EXECUTIVE AN ADEQUATE OPPORTUNITY TO REMEDY A CONSTITUTIONAL VIOLATION.

This petition raises the question of whether a court, when it reverses its own precedent on the constitutionality of a comprehensive statewide system, has the inherent equitable jurisdiction to craft a decree which defers to the sound judgment of the state to design a new solution to its own problems. The Court of Appeals recognized that the issue of its residual equitable authority and the continuing viability of *Chevron*'s doctrine of "pure prospectivity"[12] is unresolved since this Court's recent pronouncements on retroactivity and remedy in *Reynoldsville* and *Harper.* (Pet. App. 150) *See also, Mills v. Maine,* 118 F.3d 37 (1st Cir. 1997); *Olcott v. Delaware Flood Co.,* 76 F.3d 1538, 1547 (10th Cir. 1996); *National Fuel Gas Supply Corp. v. F.E.R.C.,* 59 F.3d 1281 (D.C.Cir. 1995); *McKinney v. Pate,* 20 F.3d 1550, 1565 (11th Cir. 1994). The Court's guidance is needed on this important point of constitutional law.

It is well established that the scope of a district court's equitable powers to remedy constitutional violations is of the broadest nature, because "breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1971). The trial court specifically found that New Jersey had relied reasonably upon prior judicial precedent in issuing 53 separate authority revenue bonds to build its public solution to the solid waste crises between the *Filiberto*

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[12] *See James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 534-37 (1991) (opinion of Souter, J.) (defining varieties of retroactivity and prospectivity).

decision in 1988 and the 1994 *Carbone I* decision. On the basis of that strong reliance and the grave disruption to the public interest that the district court determined would result from a hasty transition, it entered an equitable stay of its injunction of the regulations to allow the state time to remediate the system. The Court of Appeals failed to accord proper deference to the trial court's findings, *Lemon*, 411 U.S. at 200, and misinterpreting this Court's precedents, *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *Reynoldsville, supra*; reversed the remedial decree which had granted the State two years to remodel its system, anticipated to be "time-consuming and [to] require extensive planning." (Pet. App. 267)

As clearly demonstrated in the record below, this is not a simple case of the invalidation of one contract with a privately owned and operated transfer station, *Carbone I*, or the affirmative defense to the timeliness of one civil lawsuit, *Reynoldsville*. Nor is it an instance wherein the simple removal of a sign enforcing segregation will resolve the constitutional violation and can be unobtrusively mandated by the federal court. *Watson v. City of Memphis, Tenn.*, 373 U.S. 526 (1963). Plaintiffs attacked the constitutionality of an entire statewide system affecting 7 million tons of waste per year, 22 solid waste management districts, 567 local municipalities and $1.75 billion of public obligations. Substantial effort and resources and the "delicate balancing . . . [of] the variety of interests" are involved in the question of how to remediate the New Jersey solid waste system. (Pet. App. 265-66) Both the collection and disposal industries in New Jersey are governed by interwoven and complex environmental, planning and utility regulations. No single piece, especially not one as critical as the waste flow controls, can be surgically removed from the body of regulations without

significant repair to that which remains and due consideration to the vested rights of bondholders and others.[13] The findings of the trial court, which has "first hand experience with the parties and is best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands", *United States v. Paradise*, 480 U.S. 149, 184 (1994), amply support the entry of the discretionary stay, yet were ignored or discarded by the Court of Appeals without an adequate basis in law or fact. The choices facing the State, which must be made in concert with the other levels of government responsible for the delivery of solid waste services, may range from dismantling some or all of the remaining

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[13] Examples of the types of environmental amendments foreseen by the trial court included expanded traffic and route controls (Pet. App. 273); special licensing and inspection provisions, *id;* assurance of minimum standards for disposal locations (Pet. App. 285); planning for both the right combination of alternatives and the variations required for each of the twenty-two solid waste management districts (Pet. App. 267-68); and preprocessing requirements, (Pet. App. 285). As demonstrated in the record, it took decades for the State, county and local governments to develop the challenged system. (App.(1997)A-755).

It will also take a considerable period of time to assure the integrity of the local governmental authorities currently obligated on public bond issues legally secured by the revenues of solid waste gate fees. In order to assure the fiscal stability of local government, service of the debt obligations and compliance with the complex bond covenants on the currently outstanding issues will have to be guaranteed. These steps may include review by the Department of Community Affairs, bondholder actions and/or approvals, or the preparation and marketing of new refunding issues. (App.(1997)A-1115, 23-24). Nevertheless, it must be noted that bondholder approval to allow for an amendment to the security of the revenue stream is entirely unprecedented (App.(1997)A-1125-26).

unchallenged system components to a constitutional redesignation of the waste flow schemes in the twenty-two districts.

In the face of such a wide-reaching institutional challenge, the Court of Appeals violated the principle that there must be "a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990); *Baker v. Carr*, 369 U.S. 186, 250 n.5 (1962). New Jersey "should at least have the opportunity to devise [its] own solutions to these problems," *Missouri*, 495 U.S. at 51, because a " 'legislature's efforts to tackle the problems' should be entitled to respect." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-547 (1972)). Without such deference, "the structural framework of dual sovereignty" is compromised. *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365 (1997). If the Constitution can abide – even prefer – a delay in implementing solutions on behalf of students, *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977); prisoners, *Rufo v. Inmates of Suffolk Jail*, 502 U.S. 367 (1992); or voters, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978), in favor of allowing local officials the opportunity to devise those solutions, surely no less deference is warranted in the area of the dormant rights of interstate commerce.

This distinction between judicial and legislative function is central to the principles of federal-state comity, *Lemon*, 411 U.S. at 208; *Younger v. Harris*, 401 U.S. 37 (1971), and separation of powers, *Missouri*, 495 U.S. at 52; *San Antonio Indep. School Dist.*, 411 U.S. at 42 (Judges "lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions."). *See also* Pet. App. 202. Perhaps not ironically, federalism has been chiefly adjudicated in the Commerce Clause context. *United States v. Lopez*, 514 U.S. 549, 579 (1995). It takes a carefully crafted and balanced federal order to preserve the respect due the state to legislate a remedial

scheme after the courts have drawn the delicate line between constitutional and unconstitutional burdens on interstate commerce.[14] *Ibid.*

While the Court of Appeals attempted to justify its lack of deference on grounds that the State was merely faced with the monetary costs of compliance (Pet. App. 151), the Court has made clear that even financial constraints are legitimate concerns of government defendants and therefore are appropriately considered in tailoring an equitable order. *Rufo*, 502 U.S. at 392-93. *See also id.* at 395-96 (O'Connor, J. concurring) (public officials often operate within difficult fiscal constraints which should guide equity court). Moreover, the fiscal concerns facing New Jersey are not merely the cost of compliance such as administrative or rebidding expenses. As found by the trial court, many county authorities face the very real risk of defaults on past obligations lawfully assumed prior to *Carbone I* which would have serious repercussions for all government services in the State. (Pet. App. 265) *See also McKesson*, 496 U.S. at 37, 50 (state's "exceedingly strong interest in financial stability" must be protected). It is not only financially simplistic but

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[14] Another example of how the Court blends the doctrines of federalism and separation of powers with its own equitable authority can be found in the caselaw on abstention. *See Quackenbush v. Allstate Ins. Co.*, ___ U.S. ___, 116 S.Ct. 1712 (1996). In *Quackenbush*, the Court quoted from *Railroad Comm's of Texas v. Pullman Co.*, 312 U.S. 496 (1977), to explain why the federal judiciary sometimes declines to exercise its jurisdiction:

> "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. . . . whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." [___ U.S. at ___, 116 S.Ct. at 1721].

it would violate the bar of the Eleventh Amendment for the federal courts to suggest a "solution" that requires state officials to utilize state treasury funds to satisfy past county bond obligations. *Missouri*, 495 U.S. at 56 n.20. Therefore, the trial court properly deferred to the State to devise its own solutions. As stated in a similar context in *San Antonio Indep. School Dist.*, the "very complexity of the problems of financing and managing . . . a public . . . system suggests that 'there will be more than one constitutionally permissible method of solving them.' " 411 U.S. at 42 (quoting *Jefferson*, 406 U.S. at 546-47); *see also Missouri v. Jenkins*, 515 U.S. 70 (1995) (connected case).[15] In fact, it has been said that the judicial branch is not delegated the power to pronounce new law. *Harper*, 509 U.S. at 106 (Scalia, J., concurring) (quoting 1 W. Blackstone, *Commentaries* 69 (1765)). For that very reason, when new laws are needed, the judiciary must defer to the other branches whenever possible and afford each the opportunity to assume its proper responsibility.

Because federalism, separation of powers and comity dictate that a high degree of deference be shown to state legislative and executive branches responsible for revamping New Jersey's solid waste program, the equitable stay entered by the trial court does not run afoul of the principle that an unconstitutional law is void as if never enacted, *Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559 (1913), and is remedied by simply ignoring it, *Marbury v. Madison*, 5 U.S. (1 *Cranch*) 137, 178, 2 L.Ed. 60

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[15] It is the legislative and executive branches from which that solution should come, the former being the one "most responsive and deliberative," *Loving v. United States*, ___ U.S. ___, 116 S.Ct. 1737, 1743 (1996), while the latter has the " 'primary responsibility for elucidating, assessing, and solving' . . . the intricacies of implementing" the necessary changes. *Rufo*, 502 U.S. at 392.

(1803). *See Reynoldsville*, 514 U.S. at 760 (Scalia, J., concurring). Those principles have been significantly qualified by the equity court's obligation to balance the integrity of legal rulings, represented by the doctrine of *stare decisis*, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), with the very foundations of a federalist system of government. In *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), the Court explained the limitations to be placed on these principles:

> *The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.* The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in light of the nature of both the statute and of its previous application, demand examination. *These questions are among the most difficult of those which have engaged the attention of the courts, state and federal,* and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. [308 U.S. at 374 (emphasis added)].

Chicot is recognized as having continuing validity as the premise of the federal court's exercise of equitable discretion. *Beam*, 501 U.S. at 545 (White, J., concurring); *Chevron*, 404 U.S. at 106; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *Lemon*, 411 U.S. at 198. An ample measure of discretion must be allowed to the trial court announcing a new constitutional ruling to determine how and when that ruling should go into effect.

In determining how a decision should be applied, a court must give great weight to the reliance interests of all parties affected by the change. *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 185-86 (1990). This is

especially appropriate where the application of a decision burdens a government's ability to plan or carry out its programs, thus injuring the public interest. *Id.* at 185. In the within matter, the district court expressly found significant reliance interests and a substantial risk of a serious disruption to the public interest that justified a purely prospective application of its newly announced Commerce Clause determination, including reliance on binding precedent for the issuance of significant public debt. (Pet. App. 279). *See Cipriano v. City of Houma*, 395 U.S. 701 (1969) (decision entered nonretroactively where significant hardships would be imposed on cities and bondholders); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (bonds issued on good-faith assumption would be unjustifiably disrupted by full retroactive effect).[16] It is in this sense that a "purely prospective" order is synonymous with a remedial stay of a declaratory ruling because the substantive federal law is applied but the effect of that application is deferred until a future date certain. This still viable aspect of *Chevron* must be distinguished from the instances of selective prospectivity in *Harper* and *Reynoldsville* that were properly assailed as an attempt by the lower courts to avoid application of the substantive federal law in the first instance. *Harper*, 509 U.S. at 96.

In *Reynoldsville*, the Court clarified that even after *Harper*, "[n]ot all cases concerning retroactivity and remedies are of the same sort." 514 U.S. at 755. Furthermore, some members of the *Reynoldsville* Court wrote specially to emphasize that the prospectivity analysis

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[16] *Cipriano* and *Phoenix* have been cited with approval for this equitable proposition in *Lemon II*, 411 U.S. at 198; *Chevron*, 404 U.S. at 106; *Beam*, 501 U.S. at 545 n.* (White, J., concurring), and *American Trucking*, 496 U.S. at 185 (O'Connor, J., for the plurality). *Chevron* and *Chicot* were relied upon, in turn, by the Court in *Northern Pipeline*, 458 U.S. at 88.

might have a different result in the "hard case" of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions. 514 U.S. at 761 (Kennedy, J., concurring) *See also American Trucking*, 496 U.S. at 185-86 (O'Connor, J., plurality opinion); *Beam*, 501 U.S. at 545-46 (White, J., concurring; also see O'Connor, J., dissenting). The Court has continued to note the ambiguity of its rulings to date. *Ryder v. United States*, 515 U.S. 177 (1995). In *Ryder*, Justice Kennedy, writing for an unanimous Court stated:

> [W]hatever the continuing validity of *Chevron Oil* after *Harper v. Virginia Dept. of Taxation*, 509 U.S. – (1994), and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. – (1995), there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this Petitioner that would bring that doctrine into play. [*Id.* at 184-85]

Accordingly, while purely prospective application was not warranted under the circumstances present in *Ryder*,[17] the potential availability of *Chevron's* doctrine of pure prospectivity or civil equitable authority has been recognized by the Court. Its availability is critical to the proper authority of the judicial branch and the constitutional health of our federalist government. Even in *Harper*, the Court deferred to Virginia to craft the appropriate remedy. 509 U.S. at 102; *see also Fulton Corp. v. Faulkner*, ___ U.S. ___, 116 S.Ct. 848, 862 (1995); *United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264 (1996). The voiding of the long-standing and previously affirmed solid waste system in New Jersey raises exactly that "sort of grave disruption and inequity" that would warrant the issuance of a stay of the constitutional ruling pending remediation

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[17] Nor was prospective relief properly requested in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895 (1988) (new federal law given retroactive effect in *Reynoldsville*).

because of the complexity of the environmental, planning, and funding interests that must be balanced before a restructured system can be put in place to fill that void. (Pet. App. 265-66).

CONCLUSION

As set forth herein, there are compelling and special reasons for this Court to grant the petition of the State of New Jersey for a writ of *certiorari* to the Court of Appeals for the Third Circuit to review its several decisions.

Respectfully submitted,

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